

RAIDERS OF THE LOST ART: HOW ECONOMICS AND AMNESTY CAN ENCOURAGE THE RETURN OF STOLEN ART AND ANTIQUITIES

Caitlin McBride

The illicit sale of looted art and antiquities poses an on-going threat to global cultural heritage. While international and domestic policies attempt to combat this problem, existing systems are rife with complications and tend to target only on-going sales. Collectors who are already in possession of stolen artifacts are often overlooked, and the question becomes how to encourage these collectors to return stolen artifacts to the world stage rather than keeping them hidden. Under the theory of encouraging repatriation, this Article considers criminal deterrence and economic incentive. While no model offers a clear answer to this problem, offering limited amnesty and limited economic incentive to these collectors promises more voluntary resurfacing of lost and stolen art and antiquities.

I. INTRODUCTION 131

II. BACKGROUND: HOW ART THEFT BECAME SUCH A PROBLEM..... 133

 A.Why Cultural Heritage Is So Important 133

 B.History: The Rise, the World War, and the Response 136

III. ECONOMIC INCENTIVES 141

IV. CURRENT DETERRENCE SCHEMES 146

 A.International Conventions..... 146

 B.Domestic Conventions..... 147

V. ANALYSIS: IS THERE A SYSTEM THAT WORKS? 150

 A.Deterrence Without Economic Incentive..... 152

 B.Deterrence With Economic Incentive..... 154

 C.Amnesty Without Economic Incentive..... 156

 D.Amnesty With Economic Incentive..... 158

 E.Proposal: Limited Amnesty With Limited Economic Incentive.. 160

VI. CONCLUSION 163

I. INTRODUCTION

Pierre Le Guennec was a retired electrician living with his wife, Danielle, in the south of France.¹ In 2010, he ventured into his garage and took a box off the shelf that had been sitting there for almost forty years, hoping to sell what was inside to finance an upcoming surgery.² Le Guennec contacted a local art appraiser to determine the value of the box's contents: 271 unseen original Picasso sketches³ valued at nearly \$100 million.⁴ The appraiser contacted the Picasso estate for authentication, prompting the Picassos to alert French authorities.⁵ Rather than receiving the modest payout they hoped for, the Le Guennecs found themselves sitting in a jail cell for coming forward with the sketches.⁶ At trial, Pierre Le Guennec contended that he had been a handyman for Picasso in the early 1970s, and Danielle Le Guennec was a friend to Picasso's wife, Jacqueline.⁷ Pierre Le Guennec originally maintained that the works were a gift from Jacqueline Picasso,⁸ but later revealed that Jacqueline had asked him to store the works to keep them from her step-children.⁹ The Le Guennecs received a two-year suspended

1. See Bill Whitaker, *A Picasso Mystery Examined by 60 Minutes*, CBS NEWS (July 30, 2017), <https://www.cbsnews.com/news/60-minutes-picasso-portfolio-stolen-artwork-or-gift-2/>.

2. *Id.*

3. See *id.*; Alyssa Buffenstein, *Picasso's Electrician Back in Court, Admits to Lying at Earlier Trial*, ARTNET NEWS (Nov. 1, 2016), <https://news.artnet.com/art-world/pierre-le-guennec-stolen-picassos-lying-trial-728519>.

4. See Whitaker, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* The Picasso administration did not believe their story. *Id.* According to his children, Picasso would never have given such a large amount of art. *Id.* He occasionally gifted brochures or money, but never entire sketchbooks. *Id.*

9. See *Picasso's Widow May Have Hidden Artworks from Family, Court Told*, THE GUARDIAN (Oct. 31, 2016), <https://www.theguardian.com/artanddesign/2016/oct/31/pierre-le-guennec-court-picasso-artworks>. Allegedly, Mme. Picasso gave Le Guennec about fifteen garbage bags of artwork after the artist's death, and handed him one, saying "[k]eep this, it's for you." *Id.*

sentence for possessing stolen goods.¹⁰ When asked what he would have done differently, Pierre Le Guennec replied: “If this had to be done all over again, well Monseieur, the box would’ve ended up in the chimney.”¹¹

While the case of Pierre Le Guennec seems incredible, it suggests an unspoken network hidden in the black market art trade—thousands of collectors in knowing possession of stolen art and antiquities with no way to dispose of them.¹² Government agencies tend to focus on the large-scale black market art trade used to fund criminal enterprises,¹³ and many laws protect truly innocent purchasers who mistakenly stumble across illicit goods,¹⁴ but those collectors who exist in the middle ground get lost through the cracks. Current legal schemes fail to account for smaller collectors in possession of stolen cultural heritage items and fail to give these collectors any opportunity or incentive to return the missing pieces to the world stage.¹⁵ This begs the question: how do we encourage these collectors to come forward with stolen art and antiquities?

This Article focuses on how international cultural heritage law can encourage private collectors to come forward with stolen artwork while

10. Jean-Francois Rosnoble, *Elderly French Couple Convicted Over Picasso Works Kept in Garage for Decades*, REUTERS (Dec. 16, 2016), <https://www.reuters.com/article/us-france-picasso-verdict/elderly-french-couple-convicted-over-picasso-works-kept-in-garage-for-decades-idUSKBN145114>.

11. Whitaker, *supra* note 1.

12. See, e.g., Allison Keyes, *Too Many People Have Stolen Egypt's History; Here's How It's Getting it Back*, THE ROOT (Nov. 05, 2016) <https://www.theroot.com/too-many-people-have-stolen-egypt-s-history-here-s-how-1790857588>. The problematic buyers of illicit antiquities are typically private collectors looking for trophies, rather than larger museums. *Id.*

13. See e.g., *Interpol: Cooperation Needed in Fighting Global Art Theft*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT (Oct. 26, 2018), <https://www.occrp.org/en/daily/8812-interpol-cooperation-needed-in-fighting-global-art-theft> (explaining how art experts are working with INTERPOL to help limit black market art used to fund terrorist organizations and other criminal organizations).

14. See, e.g., Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L.J. 118, 163 (1999).

15. See Interview: Chris Marinello, *The Art Loss Register*, ART MEDIA AGENCY (Jul. 25, 2013), <http://en.artmediaagency.com/70447/interview-chris-marinello-the-art-loss-register/> [hereinafter *Interview*].

maintaining deterrence on the black market. Part I looks at the historical framework of cultural heritage law, noting the importance of heritage as a human right, and analyzing how history has led to the existing global protection provisions.¹⁶ Part II discusses the economic incentives of black market art dealing and explains how the trade has become so pervasive.¹⁷ Part III addresses existing international and domestic schemes for dealing with the possession of stolen cultural artifacts.¹⁸ Part IV breaks down the response to art thefts into four general categories based on balancing deterrence and economic incentives, weighing the pros and cons of each system.¹⁹ Ultimately, this Article proposes a middle ground among these theories: offering amnesty for selling to certain reputable dealers, but offering a limited economic incentive. While not an exhaustive solution, this model could strike a balance between encouraging small collectors to come forward with stolen cultural property while maintaining some control on curbing black market art trade.

II. BACKGROUND: HOW ART THEFT BECAME SUCH A PROBLEM

A. Why Cultural Heritage Is So Important

Cultural heritage is one of the most fundamentally important aspects of human culture, enough that it has been globally recognized as a fundamental human right.²⁰ The Council of Europe's Faro Convention defines cultural heritage as "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions."²¹ In other words, cultural heritage is not only about

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See* JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 271 (1st ed. 2015).

21. Eur. Consult. Ass., *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, Treaty Series, Doc. No. 199 (2005).

recounting history, but about preserving cultural identity.²² This identity not only allows a present connection to the past, but it builds communities and creates a legacy for future generations.²³

Because the preservation of cultural heritage is globally “recognized as a right of all humankind,”²⁴ countless international organizations have called for the protection of cultural heritage.²⁵ For example, the United Nations Human Rights Council has reflected that “safeguard[ing] cultural heritage is a human rights issue,”²⁶ while the Preamble to The Hague convention notes that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”²⁷ Thus, cultural heritage is so universally valuable that its protection is a global concern.²⁸

To many scholars, any object of cultural heritage is valuable, no matter how minute.²⁹ Cultural heritage objects can be anything from manuscripts and coins to vast sculptural monuments; from intangible stories to expressive paintings of art.³⁰ These items not only possess a

22. *See id.*

23. BLAKE, *supra* note 20, at 271. “[P]roviding a positive legacy for the benefit of future generations.”

24. BLAKE, *supra* note 20, at 271.

25. *See, e.g.*, Eur. Consult. Ass., *supra* note 21.

26. Human Rights Council, Rep. of the Independent Expert in the Field of Cultural Rights, Farida Shaheed in Its Seventeenth Session, U.N. Doc A/HRC/17/38, at 19 (Mar. 21, 2011). The report by the Human Rights Council in March 2011 opens: “As reflected in international law and practice, the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development processes.” *Id.*

27. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (First Protocol), pmbl., May 14, 1954. Available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

28. *See* BLAKE, *supra* note 20, at 271.

29. *See* CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 5 (2010).

30. *See What is Meant by “Cultural Heritage”?* UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural->

value in terms of the economic price of the materials from which they are made, but more importantly, each item possesses a historic and cultural value that is priceless.³¹ In this sense, the preservation of cultural heritage is a zero-sum game—if a piece is destroyed or lost, its cultural integrity is gone forever.³² Removing an item from its natural site may destroy archaeological and historical evidence, which causes the entire world to lose knowledge about the past.³³ Furthermore, the destruction of cultural heritage objects threatens the understanding and preservation of cultures.³⁴ In wars, forces often seek out and destroy historic and artistic sites as a military tactic to destroy culture.³⁵ For example, in Bosnia in the early 1990s, Bosnian Serb forces specifically targeted and destroyed mosques, museums, libraries, and other historical and cultural sites to further their goals of genocide.³⁶ Although cultural artifacts may seem at times to be nothing more than an insignificant collection of old drawings or sculptures, they often have tremendous human significance.³⁷ As such, the illegal destruction, excavation, theft, and trade in these objects is a monumental threat to cultural heritage, demanding global protection efforts.³⁸

property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/ (last visited Oct. 31, 2018).

31. *See id.*

32. *See* FORREST, *supra* note 29, at 14 (explaining that the cultural integrity of an item will be destroyed if it is broken into parts or damaged).

33. *See id.*, at 15.

34. FORREST, *supra* note 29, at 15.

35. *See* Patty Gerstenblith, Article, *The Destruction of Cultural Heritage: A Crime Against Property or A Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 341, 343 (2016); *See* ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 153 (2014).

36. Helen Walasek, *Ethnic Cleansing, War Crimes and the Destruction of Cultural Heritage: Not Syria, but Bosnia Twenty Years Ago*, OPEN DEMOCRACY (Feb. 22, 2016), <https://www.opendemocracy.net/can-europe-make-it/helen-walasek/ethnic-cleansing-war-crimes-and-destruction-of-cultural-heritage-no>.

37. *See* FORREST, *supra* note 29, at 15–17.

38. *See* BLAKE, *supra* note 20, at 23. “The illicit excavation, theft, and illegal exportation and trade in cultural objects is a serious threat that damages the cultural heritage and, in the most extreme cases even the cultural fabric, of most countries in the world.” *Id.*

B. History: The Rise, the World War, and the Response

The lure of misappropriating cultural heritage has been on-going for centuries:³⁹ the conquistadors stripped entire Incan cities of gold,⁴⁰ Europeans ravenously looted Egyptian tombs in the Nile Valley during the 19th and 20th century,⁴¹ and the global spread of imperialism inspired the taking of countless treasures from cultural sites.⁴² However, a global focus on the protection of cultural property has only truly taken shape in the last half-century, turning on the unprecedented looting and destruction of cultural heritage during the First and Second World Wars.⁴³

With the rise of the World Wars came powers of warfare unparalleled in human history.⁴⁴ The staggering capabilities of air-dropped bombs, tanks, and atomic weapons left centuries-old sites devastated.⁴⁵ Cities like Dresden⁴⁶ and Hiroshima⁴⁷ were annihilated, and others like London

39. See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 391 (1995).

40. See generally James Owen, *Lost Inca Gold*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/archaeology-and-history/archaeology/lost-inca-gold/> (last visited Jan. 28, 2018).

41. See generally Borodkin, *supra* note 39, at 391.

42. See generally Carmen Fishwick, *Looted Artefacts, Imperialist Statues: Is Repatriation and Removal the Answer?*, THE GUARDIAN (Feb. 22, 2016, 08:29 EST), <https://www.theguardian.com/community/2016/feb/22/looted-artefacts-imperialist-statues-repatriation-removal-answer>.

43. See FORREST, *supra* note 29, at 56. "The unprecedented destruction wrought in the First World War, and the wholesale destruction, pillage, plunder and looting of cultural heritage during the Second World War, galvanised [sic] international action to create an international regime that would protect cultural heritage during armed conflicts" *Id.*

44. See generally Gerstenblith, *supra* note 35, at 341. "World War II saw the most extensive destruction, theft, and movement of cultural objects at any time in world history." *Id.*

45. See generally FORREST, *supra* note 29, at 73; Marc Lallanilla, *Hiroshima, Nagasaki & the First Atomic Bombs*, LIVESCIENCE (May 9, 2014, 07:27 PM), <https://www.livescience.com/45509-hiroshima-nagasaki-atomic-bomb.html>.

46. See, e.g., *Bombing of Dresden*, HIST. (Nov. 9, 2009), <http://www.history.com/topics/world-war-ii/battle-of-dresden>.

left in tatters, eliminating centuries of history, art, and architecture in the blink of an eye.⁴⁸ For example, the 14th-century Cathedral Church of Saint Michael was completely destroyed during the Coventry Blitz in 1940,⁴⁹ as well as Christ Church Greyfriars, which had been standing since medieval times.⁵⁰

However, more than the destruction of cultural property caught in the crossfires, World War II brought into focus the issue of looting cultural property in times of war.⁵¹ In particular, members of the Nazi party possessed a notorious and unique appetite for the fine arts, not only for personal collections, but as a tool to neutralize non-Germanic cultures.⁵² Just a single Nazi confiscating agency reportedly “looted more than twenty-one thousand individual objects from over two hundred Jewish-owned collections.”⁵³ In Germany, pieces of new age art like cubism, modernism, and other abstract art, as well as pieces created by Jewish artists, were deemed “degenerate art” and slated for confiscation and destruction to “purify” German museums.⁵⁴ The Nazi regime continued to plunder Europe throughout the war, including the infamous pillage of the Amber Room of the Catherine Palace near St. Petersburg.⁵⁵ Countless

47. See, e.g., *Bombing of Hiroshima*, HIST. (Nov. 18, 2009), <http://www.history.com/topics/world-war-ii/bombing-of-hiroshima-and-nagasaki>.

48. See Amanda Mason, *The Blitz Around Britain*, IMPERIAL WAR MUSEUM (Jan. 8, 2018), <https://www.iwm.org.uk/history/the-blitz-around-britain>.

49. See *Coventry Cathedral*, NEW CATHOLIC ENCYCLOPEDIA (2003), <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/coventry-cathedral>.

50. See James Fawcett, *10 Historical and Cultural Sites Destroyed by War*, LISTVERSE (Mar. 13, 2014), <https://listverse.com/2014/03/13/10-historical-and-cultural-sites-destroyed-by-war/>.

51. See FORREST, *supra* note 29, at 74.

52. Anne Rothfeld, *Nazi Looted Art*, NAT'L ARCHIVES (2002), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html>. Nazis stole a variety of art, keeping many classic European pieces to themselves, while destroying pieces they saw as inferior. *Id.*

53. *Id.*

54. See *id.*; Lucy Burns, *Degenerate art: Why Hitler hated modernism*, BBC NEWS (Nov. 6, 2013), <https://www.bbc.com/news/magazine-24819441>.

55. See KENNETH D. ALFORD, NAZI PLUNDER: GREAT TREASURE STORIES OF WORLD WAR II 195 (2000).

works of art were lost in this wartime plunder.⁵⁶ Although many have been recovered through a mix of criminal investigation, restitution, and litigation,⁵⁷ the Art Loss Register—the world’s largest database of stolen and missing art—still lists nearly 30,000 items missing from Nazi occupation.⁵⁸

In response to the rampant desolation of World War II, a group of nations came together to create a system of global protection for cultural heritage, signing the Hague Convention of 1954.⁵⁹ The Convention focuses primarily on safeguarding and respecting cultural property during armed conflicts.⁶⁰ It obliges member states to refrain from attacking or misappropriating cultural property, except out of military necessity, especially during military occupation.⁶¹ The convention also includes provisions prohibiting the export of movable cultural property during times of war.⁶²

Following this convention, a number of other international agreements further expanded global protection of cultural heritage property.⁶³ For example, the Second Protocol to the Hague Convention provides for an enhanced protection status for certain sites to grant them immunity from military attack in conflicts.⁶⁴ More importantly, the Second Protocol also specifies five serious criminal offenses related to

56. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014, 12:00 AM), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

57. See Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES (Mar. 28, 2007), <https://www.nytimes.com/2007/03/28/arts/artsspecial/28law.html>.

58. See Kharunya Paramaguru, *The Top 10 Most Wanted Missing Art Works from World War II*, TIME (Nov. 7, 2013), <http://world.time.com/2013/11/07/the-top-10-most-wanted-missing-art-works-from-world-war-ii/>. See generally The Art Loss Register, <http://www.artloss.com/en> (last visited Oct. 17, 2018).

59. FORREST, *supra* note 29, at 78.

60. See First Protocol, *supra* note 27.

61. *Id.* at Art. 4.

62. *Id.*

63. See, e.g., Borodkin, *supra* note 3932, at 388–91.

64. UNESCO, *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, art. 4, 10, 11 (Mar. 26, 1999).

the destruction of cultural heritage property⁶⁵ and obliges states to adopt domestic legislation reflecting this policy.⁶⁶ The Second Protocol also allows for these offenses to be prosecuted under either domestic law or international tribunals⁶⁷ such as the International Criminal Court.⁶⁸

Following the Hague Convention, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) passed a number of cultural heritage treaties to combat the illicit sale of cultural heritage objects and antiquities.⁶⁹ The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects attempts to combat black market trade by asking buyers to verify the legitimacy of art purchases.⁷⁰ The treaty dictates that if cultural property is stolen, any possessor must return the object⁷¹ and shall only be compensated if he or she can prove good faith and due diligence at the time of purchase.⁷² International and domestic databases on stolen artwork—such as the International Criminal Police Organization’s (Interpol) Stolen Works of Art Database—help courts and purchasers

65. *Id.* at art 15.

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. making cultural property protected under the Convention and this Protocol the object of attack;
- e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

66. *Id.* at art. 16.

67. *Id.* at art. 17.

68. *See, e.g.,* Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgement and Sentence, ¶¶ 10, 11 (Sept. 27, 2016). (convicting Al Mahd in the International Criminal Court in 2016 for intentionally attacking historic monuments and religious buildings during war).

69. *See, e.g.,* Borodkin, *supra* note 39, at 388–91.

70. *See* International Institute for the Unification of Private Law [UNIDROIT], *Convention on Stolen or Illegally Exported Cultural Objects*, art. 4(4) (June 24, 1995).

71. *Id.* at art. 3(1).

72. *Id.* at art. 4(1).

assess the legitimacy of cultural heritage objects.⁷³ The treaty also allows States to compel the return of an illegally exported cultural object, only compensating the possessor if he or she can demonstrate that he or she “neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.”⁷⁴

These rules also apply to any items inherited by will or received as gifts, therefore encouraging museums and other institutions to check the credibility of donated objects.⁷⁵ The convention limits the time period to bring a claim of restitution to three years from the time the claimant identified the location of the stolen work and the possessor, as long it is within fifty years from the time of theft.⁷⁶ However, there are exceptions for archaeological sites or works belonging to a public collection.⁷⁷ The largest drawback of this agreement is that it is interpreted as only applying to cultural property stolen or illegally exported after 1995, meaning a large part of looted artwork remains untouched by the treaty.⁷⁸

Despite increased global scrutiny and resolutions to offer protection for cultural heritage, cultural artifacts and heritage sites remain in danger today.⁷⁹ Although the heartfelt preamble to the Hague Convention calls for the protection of property during conflict,⁸⁰ war has offered a breeding ground for destruction, looting, and a spike in black market trade.⁸¹ For example, “[i]n the wake of US-led victories, the museums in Amara, Kirkuk, Mosul, Kufa, Diwaniya, Suleimaniya, Dohuk and Basra

73. See *Database of Stolen Works of Art*, INTERPOL, <https://www.interpol.int/Crime-areas/Works-of-art/Database> (last updated Mar. 01, 2018).

74. UNIDROIT, *supra* note 68, at art. 6(1).

75. See generally *id.* at art. 4(5).

76. *Id.* at art. 3(3).

77. *Id.* at art. 3(4).

78. See Zsuzsanna Veres, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 SANTA CLARA J. OF INT'L L. 2, 6–7 (2014).

79. See, e.g., FORREST, *supra* note 29, at 60–61 (noting that the American-Iranian conflict led to the destruction of cultural heritage sites despite treaties like UNESCO being in effect).

80. See First Protocol, *supra* note 27.

81. See, e.g., FORREST, *supra* note 29, at 60.

were extensively looted and vandalized. As many as 4,000 artefacts, some dating to 3,500 BC, were stolen, much of which subsequently entered the world's art and antiquities market," appearing for sale in markets like New York shortly after the invasion of Iraq.⁸² This is particularly disheartening because prior to the invasion, Iraq boasted "one of the strictest and most effective protection policies in the world."⁸³ Just as in World War II, global councils are responding to these threats,⁸⁴ passing resolutions such as the United Nations Security Council's Resolution 2199, which calls "for countries to take appropriate steps to prevent the trade in stolen Iraqi and Syrian cultural property."⁸⁵ The resolution offers jurisdiction for enforcement to international organizations such as Interpol.⁸⁶

While the Le Guennecs were not collectors of artifacts pillaged from war-torn Iraqi museums or the beneficiaries of Nazi plunder, this historical framework is essential to understand why a couple like the Le Guennecs would come under such suspicion and face criminal sanctions for the possession of stolen artwork.⁸⁷ Although this historical framework offers context for the existing institutions and schemes, the nature of black market art trade can only be truly understood by recognizing the economic incentives that drive it.

III. ECONOMIC INCENTIVES

A near perfect storm of access, scattered enforcement, and enormous profit margins makes black market art trade one of the most economically lucrative illicit trades in the world.⁸⁸ The value of illicit art

82. *Id.* at 60, 63.

83. *Id.* at 60.

84. *See, e.g.,* Borodkin, *supra* note 39, at 388–91.

85. *See* Security Council Res. Unanimous, U.N. Doc. S/RES/2199, at ¶ 17 (Feb. 12, 2015); *Works of Art*, INTERPOL, <https://www.interpol.int/Crime-areas/Works-of-art/Works-of-art> (last visited Jan. 28, 2018).

86. *See Works of Art*, *supra* note 85.

87. *See* Whitaker, *supra* note 1.

88. *See* Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1435 (1992). "Indeed, art theft is now estimated to be a one-to-two-billion-dollar-a-year

trade is estimated at \$2-6 billion dollars per year,⁸⁹ making it second only to drug trafficking.⁹⁰ Three essential factors make this industry so economically lucrative: high demand for artifacts,⁹¹ ease of access,⁹² and limited regulations in trafficking.⁹³

First, scholars and anthropologists are not the only ones who recognize the significance of cultural heritage objects;⁹⁴ private collectors recognize that these objects have immense worth, both culturally and economically,⁹⁵ and are willing to pay handsomely for them.⁹⁶ For example, Johannes Vermeer's painting, *The Concert*, was stolen in 1990 and is valued at £130 million, meaning that not even a £3.2 million reward is enough to draw it off the black market.⁹⁷ Another example is Abu Sayyaf, who was in charge of dealing smuggled antiquities for

business – second only to drug trafficking as the most profitable form of illegal trade.”
Id.

89. See BLAKE, *supra* note 20, at 24.

90. See Grover, *supra* note 88, at 1435.

91. See, e.g., JANET ULPH & IAN SMITH, *THE ILLICIT TRADE IN ART AND ANTIQUITIES: INTERNATIONAL RECOVERY AND CRIMINAL AND CIVIL LIABILITY* 3 (2012). “An insatiable demand amongst collectors for certain types of antiquities has driven up prices and has led to extensive looting.” *Id.*

92. See e.g., Ed Caesar, *What is the Value of Stolen Art?*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/17/magazine/what-is-the-value-of-stolen-art.html> (explaining how “a couple of men wearing hoods” were able to break into a museum at three in the morning and walk out with priceless art); see also Jim Michaels, *Demand Still High for ISIL's Stolen Antiquities from Palmyra, Elsewhere*, USA TODAY (Mar. 31, 2016), <https://www.usatoday.com/story/news/world/2016/03/31/demand-still-high-isils-stolen-antiquities-palmyra-elsewhere/82476346/>. In fact, the internet has only made it easier to market stolen items. *Id.*

93. See generally, CHECHI, *supra* note 35, at 139–40.

94. See Alice Vincent, *The 10 Most-Wanted Missing or Stolen Paintings*, THE TELEGRAPH (Apr. 13, 2016), <https://www.telegraph.co.uk/art/what-to-see/the-most-wanted-missing-paintings/>.

95. See *id.*

96. See, e.g., Allyssia Alleyne, *Picasso Painting Stolen by Nazis Sells for \$45 Million*, CNN (May 16, 2017), <https://www.cnn.com/style/article/picasso-stolen-by-nazis-sells-for-45-million/index.html>.

97. *Id.*

ISIS—his meticulous records show profits from the trade in the hundreds of millions of dollars.⁹⁸

To these collectors (and many scholars), cultural heritage items like “coins, pottery shards, sculptural fragments, textiles, [art,] and tools of ancient cultures are economically marketable.”⁹⁹ Some collectors argue that placing such articles in the free market may encourage “mutual understanding and respect” among different cultures and might preserve the artifacts better than if they had been left undisturbed.¹⁰⁰ In fact, many scholars argue that the true value of cultural heritage can only be accessed if it is visible and accessible to the public, where the lessons of the past can influence present and future generations.¹⁰¹ However, there are thousands of collectors on the black market preying on cultural heritage objects, removing far more objects than can be justified for educational purposes.¹⁰² For example, an estimated “95% of archeological sites in Belize may have been destroyed by looting.”¹⁰³ These collectors are taking advantage of looting, war, and outright theft to get their hands on great works of art that will be passed from hand to hand in private collections, forever lost to the world at large.¹⁰⁴

Perhaps the largest component of what makes illicit art trade so lucrative is the ease of access the enterprise offers.¹⁰⁵ Cultural heritage items are extremely pervasive and often very minute, making it extremely difficult for countries to properly police cultural heritage artifacts, especially as they transfer into the hands of private dealers for

98. See Margaret Brennan, *ISIS Cashing in on Selling Plundered Antiquities to Fund Terror*, CBS NEWS (Sept. 29, 2015, 7:10 PM), <https://www.cbsnews.com/news/isis-relying-on-smuggling-antiquities-to-fund-terror/>.

99. See Borodkin, *supra* note 39, at 409.

100. *Id.* “For example, apologists for British ownership of the Elgin Marbles frequently point out that those fragments of the Parthenon are better preserved than their counterparts at the Acropolis, due to air pollution in Athens.” *Id.*

101. See FORREST, *supra* note 29, at 5.

102. Borodkin, *supra* note 39, at 383.

103. See BLAKE, *supra* note 20, at 25.

104. See *supra* pp. 10–13.

105. See, e.g., Caesar, *supra* note 92 (describing that “a couple of men wearing hoods” were able to break into a museum and make off with two drawings and a number of paintings).

years or even generations.¹⁰⁶ The system broadly takes advantage of easy opportunity and organized transactions that allow for wide profit margins.¹⁰⁷ Typically, the theft of a cultural heritage item is highly orchestrated, with middlemen paying a small fee to a local looter to find an artifact, then retaining over 98% of final market price.¹⁰⁸ The risk of penalty for trafficking stolen antiquities gives local looters a high incentive to convert stolen items into quick cash.¹⁰⁹ Given government prohibitions against exporting such goods, the risk allows the middlemen to pay the “finders” a fraction of the item’s market worth, letting the finder off with a small fee, then exporting the item to be sold at auction for a hundred times the cost.¹¹⁰ Take for example the Petén region of Central America: a looter may be paid \$200-\$500 for each vessel taken from an ancient site, but the middlemen will ultimately sell the piece at auction for \$100,000.¹¹¹ Similarly, a famer in southwest Turkey sold a Roman table-leg depicting Marsyas being flayed by Apollo for \$7,500, and the dealer re-sold the piece in New York for \$540,000.¹¹²

Of course, not all art theft comes about from such small-scale organized looting operations; some of the most valuable pieces are stolen in egregious heists.¹¹³ For example, in December 2002, two thieves broke into the Vincent van Gogh Museum in Amsterdam and made off with two paintings valued at £25 million.¹¹⁴ Even more devastating, in 1990, two men disguised as police officers made their way into the Isabella Stewart Gardner Museum and left with an estimated \$500 million worth of art, including masterpieces by Rembrandt, Vermeer, Manet, and

106. See generally BLAKE, *supra* note 20, at 23.

107. See Borodkin, *supra* note 39, at 410–11.

108. See BLAKE, *supra* note 20, at 26.

109. See Borodkin, *supra* note 39, at 410–11.

110. *Id.* at 378. “Typically, middlemen retain most of the profits in the antiquities black market, while the finders of artifacts often receive less than one percent of the retail value of their discoveries.” *Id.*

111. BLAKE, *supra* note 20, at 26.

112. *Id.*

113. See, e.g., Caesar, *supra* note 92.

114. See Vincent, *supra* note 94.

Degas.¹¹⁵ Compared with the other, more lucrative criminal enterprises of drug smuggling and arms distribution, the fact that two men disguised as police officers could walk out of a building with \$500 million worth of art makes art theft arguably one of the easiest criminal enterprises in the world.¹¹⁶

Of course, stolen artwork and antiquities are only valuable insofar as they can be sold for profit.¹¹⁷ However, “[a]s long as there is a belief among criminals in the enduring willingness of parties from the legitimate art world to retrieve their property, a stolen painting has currency.”¹¹⁸ While it is true that a high-profile painting like the stolen Degas will not be able to reach its full value because it does not have full access to reputable dealers, there are tremendous profits to be made in the dealing of stolen cultural artifacts.¹¹⁹ Unfortunately, the current systems in place to deal with these problems are scattered, making the enterprise even more lucrative.¹²⁰ Even with international treaties guiding these issues, illicit art trade is most often dealt with domestically, creating problems with jurisdiction, enforcement of foreign judgments, access to litigation, and choice of law, among others.¹²¹ With such a scattered system in place, although there are an estimated 45,000 to

115. See Shelley Murphy & Stephen Kurkjian, *Six Theories Behind the Stolen Gardner Museum Paintings*, BOS. GLOBE (Mar. 18, 2017), <https://www.bostonglobe.com/metro/2017/03/18/six-theories-behind-stolen-gardner-museum-paintings/JmwHou86qo5MtBzX1fb9cI/story.html>.

116. See generally *id.*

117. See Caesar, *supra* note 92.

118. Alex Mayyasi, *How Do You Make Money Off Stolen Art?*, PRICEONOMICS (Nov. 21, 2013), <https://priceonomics.com/how-do-you-make-money-off-stolen-art/>. See also Caesar, *supra* note 92.

119. See generally Grover, *supra* note 88, at 1435.

120. See e.g., CHECHI, *supra* note 35, at 139–40. Chechi discusses access to litigation, but other “systems” include criminal sanctions, alternative dispute resolution, private auction, etc. *Id.*

121. See *id.* at 139–142.

53,000 art thefts per year throughout the world,¹²² “only about ten percent of all stolen art is ever recovered.”¹²³

IV. CURRENT DETERRENCE SCHEMES

A. International Conventions

Countries are attempting to combat this issue at a global scale by joining treaties and protocols such as the Hague Convention or the UNESCO treaties.¹²⁴ Interpol plays one of the most aggressive roles in protecting global cultural heritage, not only retaining its own team of investigating agents who enforce cultural heritage law, but also maintaining a critical database of stolen or missing art.¹²⁵ This proves to be an effective tool, as identifying artwork as stolen places scrutiny on the work, severely limiting the dealers and auctions at which the work can be sold, therefore limiting its value.¹²⁶

On a criminal front, the International Criminal Tribunal for the former Yugoslavia has handed down multiple criminal convictions for the “post-1991 destruction and profanation of mosques, churches and other sites of educational, religious, and cultural relevance.”¹²⁷ The tribunal also made it clear that intentionally targeting the cultural assets of a culturally distinct group constituted a crime against humanity as persecution with a discriminatory intent.¹²⁸

However, like many international treaties, most of the doctrines offer limited enforcement power for issues in dispute.¹²⁹ For example, WTO members are obliged to first attempt to settle their disputes without

122. Grover, *supra* note 88, at 1439. “With between 45,000 and 53,000 art thefts taking place throughout the world every year, it is no exaggeration to say that art theft has reached epidemic proportions.” *Id.*

123. *Id.*

124. See Borodkin, *supra* note 39, at 388–91.

125. See generally *Works of Art*, *supra* note 85.

126. *Id.*

127. CHECHI, *supra* note 35, at 153.

128. See *id.*

129. See *id.* at 154.

litigation through channels such as conciliation or arbitration,¹³⁰ but if they fail to come to an agreement, the complaining party is entitled to request a panel.¹³¹ Additionally, parties to a dispute “may seek judicial settlement by submitting the dispute to a standing international tribunal with its own rules on jurisdictional competence and procedure.”¹³² Other international systems offer slightly more enforcement power.¹³³ For example, the International Court of Justice can offer binding decisions on cultural heritage property disputes among States using international law.¹³⁴ For instance, under the United Kingdom Rules of Civil Procedure, any non-complying states can face sanctions.¹³⁵ While these systems are essential in the effort to limit illicit art trade, they unfortunately have a mixed effect.¹³⁶ International disputes lead to a host of complications, such as issues of jurisdiction, choice of law provisions, evidence, and the excessive cost of litigation.¹³⁷

B. Domestic Conventions

The majority of art and cultural heritage control is handled through domestic regulations.¹³⁸ One of the most common tactics is to implement stringent import and export laws to catch black market artifacts in transit.¹³⁹ Artifact-rich states often implement “umbrella” licensing schemes that often require certification for dealers in antiquities that fall under the umbrella.¹⁴⁰ However, these schemes are often difficult to

130. *See id.* at 138.

131. *See id.*

132. *Id.* at 146.

133. *See id.*

134. *See id.* at 147.

135. *See* Norman Palmer, *Litigation: The Best Remedy?*, in *RESOLUTION OF CULTURAL PROPERTY DISPUTES* 265, 268 (The Int’l Bureau of the Permanent Court of Arbitration ed., 2003).

136. *See, e.g., id.*

137. *See* CHECHI, *supra* note 35, at 139–42.

138. CHECHI, *supra* note 35, at 138. “The initiation of legal proceedings before domestic courts is the main avenue for the settlement of the majority of transnational cases, including those involving cultural assets.” *Id.*

139. BLAKE, *supra* note 20, at 31–32.

140. *See id.* at 29.

enforce, as customs officers may lack the expertise to identify illicit cultural property trade or may even turn a blind eye to it.¹⁴¹ In some cases, these export controls are not required by law, but are informal industry practice.¹⁴² For example, in the United Kingdom, museums self-regulate the trade and sale of art within their industry, imposing voluntary certification programs and ethical codes for parties to follow.¹⁴³

Many countries also follow the lead of Interpol, maintaining databases of stolen artwork and creating special task forces to investigate and deter art theft and illicit trade.¹⁴⁴ For example, a special branch of the Italian Carabinieri called *The Carabinieri Command for Protection of Italy's Cultural Heritage* (Carabinieri T.P.C.) is responsible for combatting the illicit sale and theft of art and antiquities in Italy.¹⁴⁵ Similarly, in the United States, the Federal Bureau of Investigation (FBI) has a special division for Art Theft and Property Crimes and maintains a national database on stolen art called *The National Stolen Art File* (NSAF).¹⁴⁶

Finally, some States implement laws specifically directed at the preservation of cultural heritage.¹⁴⁷ Title 3.4 of the Dutch Civil Code has specific provisions for the protection of cultural heritage, including mandating a due diligence standard at the acquisition of a cultural object.¹⁴⁸ Canada has a number of national cultural property acts such as

141. *Id.* at 30.

142. *See id.* at 33–34.

143. *Id.* at 33–35.

144. *Specialized Police Forces*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/partnerships/specialized-police-forces/> (last visited Mar. 03, 2018).

145. *See* Sylvia Poggioli, *For Italy's Art Police, An Ongoing Fight Against Pillage of Priceless Works*, NPR (Jan. 11, 2017), <https://www.npr.org/sections/parallels/2017/01/11/508031006/for-italys-art-police-an-ongoing-fight-against-pillage-of-priceless-works>; Jenny Starrs, *Special Squad of Italian Police Crack Case of Verona Museum Theft, Arrest 13 Suspects*, THE WASHINGTON POST (Mar. 17, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/17/special-squad-of-italian-art-police-crack-case-of-verona-museum-theft-arrest-13-suspects/?utm_term=.36fc6edfc96e.

146. *Art Theft*, FBI, <https://www.fbi.gov/investigate/violent-crime/art-theft> (last visited Mar. 03, 2018).

147. *See, e.g.*, BLAKE, *supra* note 20, at 31–32.

148. Art. 3:87a paras 1-3, BW (Neth.); Art. 3:86a paras 1-4, BW (Neth.).

the Cultural Property Export and Import Act,¹⁴⁹ and the United States has implemented the 1972 Pre-Columbian Art Act, which bans the import of pre-Columbian artifacts from Mexico into the United States unless the country of origin certifies that the importation of the artifact does not violate any of the origin country's laws.¹⁵⁰ Many of these statutes provide for specific criminal sanctions for anyone in possession of stolen artifacts.¹⁵¹ For example, the Canadian Cultural Property Export and Import Act "makes it an offence for a Canadian citizen or resident to unlawfully remove cultural objects" from any member state of the Second Hague Protocol.¹⁵² Other countries rely on more generic provisions in their own domestic codes to protect cultural property.¹⁵³ For example, France relied on the provision of its penal code dealing with the possession of stolen goods to handle the Le Guennec case.¹⁵⁴

Regardless of whether domestic laws handle cultural property implicitly or explicitly, there are a number of issues that come with relying on domestic courts.¹⁵⁵ On one hand, courts allow for definitive decisions that can be clearly enforced, often establishing legal precedents through common law or inspiring statutes in both common law and civil law jurisdictions.¹⁵⁶ This is particularly useful in cases where the legislature lacks the expertise to handle these sorts of issues.¹⁵⁷ However, relying on domestic policies also presents a number of problems—chiefly among them are issues of jurisdiction.¹⁵⁸ Complainants often have little control over how a case can be heard and are limited to laws that can vary dramatically from jurisdiction to jurisdiction.¹⁵⁹ Domestic

149. Cultural Property Export and Import Act, R.S.C. 1985, c C-51 (Can.).

150. Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091–2092 (1972).

151. *See, e.g.*, CHECHI, *supra* note 35, at 141 n.375.

152. *Id.*

153. *See generally id.* at 139.

154. *See* Rosnoble, *supra* note 10; CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 321-1 (Fr.).

155. *See* CHECHI, *supra* note 35, at 139–42.

156. *See id.* at 139–140.

157. *See generally id.*

158. *Id.* at 140.

159. *Id.*

judges often lack the expertise to deal with issues of art theft properly, and though domestic courts can implement a clear decision,¹⁶⁰ enforcement of that decision is often shorthanded due to jurisdictional issues.¹⁶¹ Furthermore, because cultural heritage objects like art are so easy to move and the laws so complex, there are often evidentiary issues, as it becomes difficult to prove that a defendant removed objects before a given time with full knowledge of that country's export laws.¹⁶² Overall, while domestic conventions offer more direct enforcement of cultural heritage issues than international schemes, they are still faced with a litany of problems.¹⁶³

V. ANALYSIS: IS THERE A SYSTEM THAT WORKS?

Regardless of whether the illicit trade of cultural heritage objects is governed by international treaties or domestic legislation, as with any crime, the system is controlled by a balance of economic incentive and deterrence from criminal or civil penalties.¹⁶⁴ Like any organized crime scheme, for some, the vast economic incentive largely eclipses the risk of such penalties.¹⁶⁵ However, this note focuses not on stemming the trade of black market art from the source, but on encouraging the return of already stolen property.¹⁶⁶ What balance of economic incentive would encourage someone like Pierre Le Guennec to come forward with their

160. *Id.* at 143.

161. *Id.* at 142.

162. *See e.g., id.* "Since more than half a century has passed since the Second World War, evidence is now lost or extremely difficult to collect. While many of those involved have passed away, those who are alive or their descendants may have no documentation, photos, or witnesses, and statements taken from witnesses such a long time after the event are not always fully reliable."

163. *See id.* at 139–42.

164. *See generally* ROBERT D. COOTER & THOMAS ULEN, *LAW & ECONOMICS* 454–56 (6th ed. 2011).

165. Borodkin, *supra* note 39, at 378.

166. *See* Whitaker, *supra* note 1. For example, the Le Guennecs did not purchase the Picasso sketches from a black market art dealer, they came to possess the art without ever being involved in black market trade. *Id.*

Picasso sketches?¹⁶⁷ What will it take to encourage someone to come forward with an antiquity looted from the Baghdad museum?¹⁶⁸ Is the stick of deterrence enough, or must there be a carrot to coax these pieces out from hiding?

This section analyzes two simple factors: whether to maintain criminal or civil sanctions as deterrence,¹⁶⁹ and whether to offer an economic incentive for the return of stolen art or antiquities.¹⁷⁰ The combination of these factors can be broken down into four discrete models: deterrence without economic incentive, deterrence with economic incentive, amnesty without economic incentive, and amnesty with economic incentive. While there are no concrete systems in place that offer all of these models clearly, a mix of formal systems and informal agreements reveal that each these models are already in play to some degree.¹⁷¹ Although there is no clear model that fully reveals lost work while discouraging black market trade, a balance of limited amnesty and economic incentive appears to be appropriate to encourage the return of stolen art and antiquities from private collectors.¹⁷²

167. See *id.* (discussing Le Guennec wanting to sell the sketches to fund a surgery).

168. See, e.g., FORREST, *supra* note 29, at 63.

169. Such as the French criminal sanction for possessing stolen goods. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 321-1 (Fr.).

170. See Borodkin, *supra* note 39, at 406–07. This could come in the form of either allowing collectors to keep the proceeds of selling their looted art or offering a straight reward for the repatriation of missing works. *Id.*; see, e.g., Samira Said & Ralph Ellis, *\$10 Million Reward Deadline Approaches in Unsolved Art Heist*, CNN (Dec. 28, 2017), <https://www.cnn.com/2017/12/27/us/stolen-art-reward-dropping-to-5-million/index.html> (discussing an alternative economic gain through a reward for the repatriation of missing works).

171. See Carl Franzen, *Ill-Gotten Gains: How Many Museums Have Stolen Objects in Their Collections?*, THE VERGE (May 13, 2013), <https://www.theverge.com/2013/5/13/4326306/museum-artifacts-looted-repatriation> (discussing museums informal negotiations to get stolen pieces returned without risk of criminal penalties).

172. Mayyasi, *supra* note 118. This model is how many institutions negotiate the return of lost art. and what encouraged Pierre Le Guennec to come forward with the Picasso sketches. *Id.*; see Whitaker, *supra* note 1.

A. Deterrence Without Economic Incentive

The first response model is to strictly impose criminal or civil penalties for anyone found in possession of stolen cultural property while eliminating all economic incentive.¹⁷³ France followed this model in the Le Guennec case, confiscating the Picasso sketches, allowing the Le Guennecs to retain none of the economic value of the pieces, and charging them criminally with possession of stolen goods.¹⁷⁴ This model is the harshest response to the illicit art trade, offering no incentive and creating a system of pure deterrence.¹⁷⁵ Many of the existing legal systems follow this pure deterrence model and have enacted statutes that outline clear criminal penalties and the confiscation of illicit goods.¹⁷⁶ Those in favor of this model support that it sends a clear message: those engaged in the illicit art trade will face consequences and reap no rewards.¹⁷⁷ This no-tolerance policy for black market trade not only puts perpetrators on alert, but also sends a clear message across the international community that individual countries and international organizations are taking this problem seriously.¹⁷⁸ At an individual level, this method deters casual buyers who view the risk of punishment as far outweighing the gamble of a reward.¹⁷⁹ This method is an effective tool to cut off black market trade at its head, as the cost of being involved in an illicit trade will shame buyers and decrease the demand for the market, thereby discouraging further supply.¹⁸⁰

173. See, e.g., Press Release, U.S. Dep't of Justice, U.S. Seeks Warrant to Seize Ring Trafficked by ISIS (Dec. 06, 2017) (available at <https://www.justice.gov/usao-dc/pr/united-states-seeks-warrant-seize-ring-trafficked-islamic-state-iraq-and-syria-isis>). For example, the U.S. FBI will seize illicitly imported art and antiquities and charge the possessors criminally. *Id.*

174. Rosnoble, *supra* note 10.

175. For a discussion of the deterrence principle, see Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 654 (1990).

176. See, e.g., Cultural Property Export and Import Act, R.S.C. 1985, c C-51 §§37 (2), (7) (Can.).

177. See BLAKE, *supra* note 20, at 30–31.

178. See *id.* at 39–31.

179. See *id.*

180. See Brennan, *supra* note 98.

However, at the cost of sending a clear message to larger criminal enterprises and new buyers who are perpetuating further illicit trade, this method also deters existing collectors from coming forward with their art collections.¹⁸¹ Christopher A. Marinello, an attorney who has dedicated his life to recovering stolen works of art, notes that “[i]t is rare that a possessor willingly returns stolen artwork without asking for a reward or some kind of remuneration.”¹⁸² In other words, those in knowing possession of a stolen work will rarely, if ever, come forward without some form of economic incentive, particularly if the only reward they will face is a potential prison sentence.¹⁸³

While the pure deterrence method sends a message to those seeking to engage on the black market, it also sends a clear message to those already in possession to stay in hiding.¹⁸⁴ Even Pierre Le Guennec troublingly noted that if he had known he would have faced a criminal conviction for bringing the Picasso sketches forward, he would have burned the pieces.¹⁸⁵ Furthermore, under Italian law, major artworks and private collections must be offered for sale to the government before private collectors and cannot be transferred without the permission of local government.¹⁸⁶ Such a strict provision offers direct control on the movement of art pieces, but simultaneously encourages collectors to keep important works unlisted or concealed.¹⁸⁷

181. See, e.g., Whitaker, *supra* note 1. Le Guennec reported that he would have rather burned the Picasso works than be faced with criminal sanctions. *Id.* Harsh Italian laws also encourage owners of important works to keep them concealed. See Guy Stair Sainty, Letter to the Editor, *What Makes Italy a Major Black Market in Art*, N.Y. TIMES (Mar. 16, 1990), <http://www.nytimes.com/1990/03/16/opinion/1-what-makes-italy-a-major-black-market-in-art-913590.html>.

182. See Interview, *supra* note 15.

183. See generally *id.*

184. See Sainty, *supra* note 181.

185. Whitaker, *supra* note 1.

186. See Stefano Pirovano, *Long Overdue Revolution in Italian Fine Art Export Law is About to Happen*, CONCEPTUAL FINE ARTS (Apr. 10, 2017), <https://www.conceptualfinearts.com/cfa/2017/04/10/long-overdue-revolution-in-italian-fine-art-export-law-is-about-to-be-happen/>; Maud Appleton Hartwell, *The Expatriation of Italian Works of Art*, PERRY MAG., Feb. 1902, at 210, 213; Frank Jewett Mather Jr., *Safeguarding the Art Treasures of Italy*, 191 N. AM. R. 105, 105 (1910).

187. See Sainty, *supra* note 181.

Nothing about the pure deterrence method encourages collectors to come forward with art, meaning the only remaining method is to rely on task forces such as Interpol¹⁸⁸ or the FBI to investigate and smoke out the missing pieces.¹⁸⁹ While such methods do allow for the recovery of major thefts, many recovered pieces come to the market through sale or litigation,¹⁹⁰ meaning that small-scale buyers can easily slip through the cracks. Overall, the pure deterrence system only encourages pieces of stolen artwork and antiquities to remain lost to the world, or worse, destroyed.¹⁹¹

B. Deterrence With Economic Incentive

Given that the economic incentives in dealing black market antiquities is so high,¹⁹² a possible alternative to the pure deterrence model would be to allow sellers to retain their economic incentives, but still maintain criminal or civil sanctions against them. The major caveat with this model is that the economic incentive would have to substantially outweigh the price of the criminal or civil sanctions.¹⁹³ However, this system is largely how the black market already operates.¹⁹⁴ For actors on the black market, this system is clearly effective, as the trade is highly profitable and low-risk—the exports and imports are more difficult to detect than something like narcotics,¹⁹⁵ the laws governing this trade are often inconsistent and confusing,¹⁹⁶ the penalties are typically low,¹⁹⁷ and the majority of the risk is shifted onto low-paid thieves looting the art and antiquities at the ground level.¹⁹⁸ The other issue is that many of these smuggling operations are run by organized crime syndicates, who

188. See, e.g., *Database of Stolen Works of Art*, *supra* note 73.

189. See *Art Theft*, *supra* note 146.

190. See e.g., Caesar, *supra* note 92.

191. See, e.g., Whitaker, *supra* note 1.

192. See Borodkin, *supra* note 39, at 378.

193. See Akers, *supra* note 175, at 654.

194. See generally ULPH & SMITH, *supra* note 91, at 3.

195. See generally Borodkin, *supra* note 39, at 407.

196. See generally BLAKE, *supra* note 20, at 30.

197. See, e.g., Rosnoble, *supra* note 10.

198. BLAKE, *supra* note 20, at 26.

already make a living off illicit trade.¹⁹⁹ For example, Martin Cahill, an Irish mobster, traded a painting stolen from the Beit Collection in exchange for heroin in Istanbul.²⁰⁰ For organized crime syndicates, the deterrence of strict criminalization does not outweigh the economic incentive of smuggling art, but rather, it is merely another business expense.²⁰¹

Of course, one of the major issues with organized crime is that the trade channels of the black market are limited.²⁰² Part of the frustration of owning even a highly valuable piece on the black market is that there are limited opportunities to turn that asset into profit.²⁰³ Opening up reputable trade channels could encourage possessors to come forward from the pure incentive of being able to sell their stolen goods on a wider market.²⁰⁴ UNIDROIT has a policy in place under 19 U.S.C. 1595a(c), which “balances compulsory repatriation with financial compensation for bona fide purchasers” by allowing a bona fide purchaser to maintain the economic incentive of bringing stolen art forward via reasonable financial compensation while maintaining the penalty of mandatory repatriation of the artwork.²⁰⁵ This policy could be expanded to knowing possessors of stolen artifacts whose work would be mandatorily repatriated, but with the benefit of fixed financial compensation.²⁰⁶

The draw of being able to get rid of a piece for a smaller profit in exchange for a more immediate sale may be enough to encourage pieces out of hiding and back into the reputable world.²⁰⁷ This model is not

199. Borodkin, *supra* note 39, at 385.

200. Caesar, *supra* note 92.

201. See BLAKE, *supra* note 20, at 30.

202. See, e.g., Caesar, *supra* note 92.

203. See *id.*

204. *Id.*; see also BLAKE, *supra* note 20, at 31.

205. Goldrich, *supra* note 14. He also comments: “[t]his measure properly places liability for compensation on the wrongdoer, but does not do so at the expense of the bona fide purchaser, who will be paid by the claimant if the wrongdoer cannot be located.” *Id.*

206. For example, the Picasso sketches would be mandatorily repatriated to the Picasso estate, but the Le Guennec would be economically compensated for the pieces. See Whitaker, *supra* note 1.

207. See, e.g., Caesar, *supra* note 92.

isolated, as there have “been calls made for liberating the trade in art as a means of reducing the amount of illicitly trafficked items by making more legitimate art and antiquities available to dealers and buyers.”²⁰⁸ Although this position is “strongly resisted by those who favour more protectionist approaches,”²⁰⁹ it could offer some clear incentives, particularly for those individuals who are already in possession of stolen art or antiquities.

Organized crime syndicates aside, this model could create a balance between discouraging criminal activity and encouraging sellers to come forward.²¹⁰ However, this only works if the economic incentive outweighs the cost of the penalty, which becomes less and less likely at a smaller scale.²¹¹ For a small actor like Pierre Le Guennec, the economic incentive of selling the Picasso collection was not worth the price of the criminal sanction.²¹² The economic incentive drew the works out of their forty-year hiding in the first place,²¹³ but given that Le Guennec was so scarred by his brief stay in jail that he had to seek therapy,²¹⁴ the economic incentive does not substantially outweigh the cost of the experience. Overall, it seems unlikely that an average layperson would generally subject himself to such harsh penalties, even to keep profit.²¹⁵

C. Amnesty Without Economic Incentive

Shifting away from the threat of deterrence, another model would be to grant amnesty to possessors of stolen art while refraining from

208. BLAKE, *supra* note 20, at 31.

209. *Id.*

210. After all, the draw of economic incentive is what encouraged Pierre Le Guennec to come forward with the Picasso sketches. See Whitaker, *supra* note 1.

211. See Akers, *supra* note 175, at 654.

212. See Peter Allen, *Husband and wife convicted of stashing £50m worth of stolen Picasso paintings for more than 40 years after having worked for the Spanish artist in the 1970s*, DAILY MAIL (Mar. 20, 2015), <http://www.dailymail.co.uk/news/article-3004184/Husband-wife-convicted-stashing-50m-worth-stolen-Picasso-paintings-40-years-having-worked-Spanish-artist-1970s.html>.

213. *Id.*; Whitaker, *supra* note 1.

214. See *id.*

215. See generally Akers, *supra* note 175.

offering any economic incentive. Unfortunately, as discussed above, without any economic incentive, there is little to encourage owners from coming forward with potentially stolen art.²¹⁶ However, this has not stopped a select few organizations from trying.²¹⁷ For example, a group of art enthusiasts formed the group Friends of Art to purchase visual art pieces for Pittsburg Public Schools.²¹⁸ Many of the works were stolen, and the group offered a public promise of amnesty from any criminal charges for anyone would return the lost pieces.²¹⁹ More controversially, many museums, such as the New York Museum of Metropolitan Art have been accused of accepting stolen works,²²⁰ and have even repatriated some looted pieces.²²¹ Although the museum promised to investigate their collections, few pieces have been returned.²²²

For a small collector like Pierre Le Guennec, if he was given the choice in retrospect, he would likely have been happy to take such a deal as opposed to his criminal sentence.²²³ However, given that Le Guennec only removed the sketches from his garage due to the incentive of gaining money for an upcoming surgery, it seems unlikely that he would have come forward comforted only by the fact that he would not go to prison.²²⁴ While a charitable spirit or even a guilty conscience may drive some collectors to bring lost works back to the public eye, mere amnesty

216. See e.g., *Interview*, *supra* note 15. “It is rare that a possessor willingly returns stolen artwork without asking for a reward or some kind of remuneration. I do my best to assist good faith purchasers of stolen or looted artwork in seeking reimbursement from the party that sold the item from them.” *Id.*

217. See, e.g., M. Thomas, *Friends of Art Offers Amnesty for Missing Artworks*, PITT. POST-GAZETTE (Mar. 13, 2016, 12:00 AM), <http://www.post-gazette.com/news/education/2016/03/13/Friends-of-Art-offers-amnesty-for-missing-artworks/stories/201603130093>.

218. *Id.*

219. *Id.*

220. See generally Isabel Vincent, *New York Museums Have Not Returned Nazi-Seized Art*, N.Y. POST (Oct. 7, 2012, 4:00 AM), <https://nypost.com/2012/10/07/new-york-museums-have-not-returned-nazi-seized-art/>.

221. Franzen, *supra* note 171.

222. *Id.*

223. See generally Allen, *supra* note 212.

224. See Whitaker, *supra* note 1.

does not seem enough to coax collectors to act.²²⁵ Even with the stick of deterrence gone, without any sort of carrot to encourage collectors to act, the works will remain lost to private collections.²²⁶

D. Amnesty With Economic Incentive

The final model is the option of offering amnesty while allowing collectors to maintain the economic incentives of selling their stolen art or antiquities.²²⁷ This is the most liberal approach, offering a pure reward model²²⁸ in contrast to the pure deterrence model.²²⁹ As discussed above, opening the market of stolen antiquities to legitimate dealers and buyers would increase the forums in which black market art could be sold.²³⁰ This, in turn, would encourage collectors to bring stolen works to auction, prompting more and more lost pieces to be recovered and returned to the world at large.²³¹

However, critics of this model point out that this system is likely to encourage black market trade, in stark opposition to many State's protectionist approaches.²³² With more legitimate avenues of sale open to vendors, the market can expand to the rising demands of purchasers who are willing to buy in reputable markets.²³³ With no risk of criminal or civil penalties and full economic advantage to be gained, the already lucrative trade of black market art and antiquities would easily skyrocket.²³⁴ Implementing such a system sends a message of tolerance to these criminals, encouraging more looting behavior to keep up with profitable demands, especially when there is no deterrence to stop

225. See *Interview*, *supra* note 15.

226. See, e.g., *id.*

227. See generally BLAKE, *supra* note 20, at 31 (explaining that one system is to open the market for trade in antiquities to cut down on the black market).

228. See Akers, *supra* note 175, at 654.

229. See *supra* Part IV A.

230. See Caesar, *supra* note 92; see also BLAKE, *supra* note 20, at 31.

231. See generally BLAKE, *supra* note 20, at 31.

232. See *id.*

233. See generally Borodkin, *supra* note 39, at 377–80.

234. See generally *id.* at 406–08.

them.²³⁵ So, while a pure incentive system encourages the return of already lost pieces, it also encourages the further looting and destruction of cultural heritage sites.²³⁶

While this model seems to unreasonably and explicitly encourage black market trade, in practice, it is surprisingly more common than the cost would suggest.²³⁷ For many reputable collectors like museums, under-the-table negotiations can be the easiest and most expedient way to have stolen artifacts returned.²³⁸ For example, the Tate Gallery in London reportedly paid an attorney \$5.6 million to negotiate the return of stolen paintings,²³⁹ and thieves often demand ransom fees for the safe return of stolen pieces.²⁴⁰

In addition, in many legal systems, it is fairly simple to obtain titles for stolen works of art.²⁴¹ For example, in the Netherlands, title will be given to one in possession of a cultural heritage artifact so long as the possessor can demonstrate reasonable due diligence in finding whether the piece has reputable title.²⁴² Furthermore, even if a stolen piece is discovered, the process of litigation and repatriation is lengthy, expensive, and fraught with issues.²⁴³ This gives true owners an incentive to negotiate a quiet deal, often opting to pay a nominal fee for the safe and swift return of the piece.²⁴⁴ Therefore, despite the public image of reputable institutions ardently refusing to negotiate with thieves, in

235. See, e.g., Caesar, *supra* note 92; see also Borodkin, *supra* note 39, at 407.

236. See generally Borodkin, *supra* note 3932, at 406–07.

237. Mayyasi, *supra* note 118.

238. *Id.*

239. *Id.*

240. See *id.*

241. See *id.*

242. See *id.*; see also Art. 3:87a paras 1-3, BW (Neth.); see also Art. 3:86a paras 1-4, BW (Neth.).

243. See CHECHI, *supra* note 35, at 139–42.

244. See Mayyasi, *supra* note 118. See also, BLAKE, *supra* note 20, at 30. “Such penalties, however, must be in terms of prison sentences as well as fines for serious cases since, otherwise, the money to be made from this trade would make most fines simply a business expense for serious smugglers.” *Id.*

practice, it is often a more practical solution than relying on a slow-moving and scattered court system.²⁴⁵

While this model strongly encourages organized black market schemes, for the smaller collector like Le Guennec, it is the perfect model to drive lost pieces out of hiding.²⁴⁶ The Picasso pieces were only recovered in the Le Guennec case because the Le Guennecs believed they were opting into this system—Pierre Le Guennec never anticipated criminal penalties and was going to use any profits from auction to pay for an upcoming surgery.²⁴⁷ Therefore, although this method undoubtedly promulgates the spread of black market art trade and the further destruction of cultural heritage sites and art theft, it is simultaneously the best system to encourage private collectors to come forward and return missing pieces back to the world stage.²⁴⁸ However, this begs the question: is there a way to limit this system to encourage these private collectors without sacrificing all deterrence against black market trade?

E. Proposal: Limited Amnesty With Limited Economic Incentive

While each of the four proposed models offers its own benefits and consequences, there is no model that offers a clear solution to all problems.²⁴⁹ Rather, a middle ground approach should be used to encourage these smaller scale collectors to come forward with stolen pieces.²⁵⁰ Given the above analysis, a grant of amnesty with economic incentive is the best way to encourage the return of lost pieces to the world stage.²⁵¹ However, in the interest of curbing encouragement of the black market, these provisions of amnesty and economic incentive

245. See generally BLAKE, *supra* note 20, at 30 (discussing the difficulties of relying on the court and legal systems); see also CHECHI, *supra* note 35, at 139–40; see also Caesar, *supra* note 92.

246. See Whitaker, *supra* note 1.

247. *Id.*

248. See *supra* Part II. Primarily because economic incentive is one of the only ways to encourage this art to come forward. See Interview, *supra* note 15.

249. See *supra* Part IV.

250. See, e.g., Interview, *supra* note 15 (discussing that almost no possessors of stolen art come forward without economic incentive).

251. See generally *id.*; see also *supra* Part II, IV.

should be limited to those who meet certain criteria. In theory, offering amnesty only if goods are sold or donated to specific reputable dealers and enforcing a cap on the economic incentive could be an effective method to accomplish this goal.

One way to place limitations on a grant of amnesty for criminally possessing stolen goods would be to offer it only to those who sell or donate to select reputable dealers. These dealers are more likely to expose the lost pieces to the public, rather than move them into private hands.²⁵² For example, a public museum or university can put pieces of art and antiquities on display to educate the public and preserve cultural heritage, accomplishing the larger goals of treaties like the Hague Convention.²⁵³ Offering amnesty incentives for collectors to sell to these institutions expands the market to reputable sources, but does not open the floodgates enough to offer a significant expansion to the black market.²⁵⁴ Although this proposal conflicts with many museums' missions to curb black market art and only showcase legitimate pieces, this also serves the larger goal of encouraging more lost pieces to surface.²⁵⁵

Selling to these limited organizations would also allow the entities to control the economic incentives offered to these sellers. For example, if a collector in possession of a stolen work tries to sell to a museum where he or she will be offered amnesty, the museum could cap the offer at 5% of the piece's market value.²⁵⁶ As discussed above, even selling a piece for a fraction of its market worth is often a better alternative for sellers than sitting on the asset for decades, particularly as the limited market for

252. For example, selling a piece to the New York Museum of Metropolitan Art will expose the work to the public eye. *See, e.g.,* Vincent, *supra* note 220.

253. First Protocol, *supra* note 27.

254. *See* BLAKE, *supra* note 20, at 30–31 (discussing that proposals have been made to open stolen art to more reputable markets of trade); Caesar, *supra* note 92.

255. *See, e.g.,* Vincent, *supra* note 220.

256. *See, e.g.,* Caesar, *supra* note 92 (discussing that the men who stole from the Rotterdam Museum tried selling the paintings they stole at several different price points). If museums capped the amount of money that would be given for turning over a piece of work, it would prevent the seller from trying to hold out for a better price and would likely aid in the return of the work, unlike what happened to the Rotterdam art. *Id.*

stolen artwork means pieces only sell for an average of 7% to 10% of open-market value.²⁵⁷

Each institution should have the authority to negotiate the amount of an offer, but a group like UNESCO could recommend a general cap to ensure the practice is not encouraging black market trade. While this approach may not work for multi-million dollar pieces, it could be effective for cultural heritage objects on a smaller scale.²⁵⁸ Once again, this would open sellers to legitimate channels of trade, but the capped costs would help control the otherwise unwieldy profit margins.²⁵⁹ Legitimizing the trade might also encourage sellers to utilize reputable avenues of trade, favoring a clean sale for less profit over a higher price with an increased risk of criminal penalty.²⁶⁰

Of course, this system could lead to an influx of litigation seeking repatriation of stolen pieces, particularly for member countries of agreements like the Hague Convention that mandate the return of stolen art.²⁶¹ However, at the expense of increased litigation, there is the potential to gain priceless cultural value in seeing the return of missing pieces.²⁶² Unfortunately, while the preservation of art, culture, and history is the driving force of these institutions, the sentiment is idyllic in comparison to the reality of running a business.²⁶³ The only true way this system could work is for museums to value the return of missing pieces over the cost of litigation, negotiation, and repatriation.²⁶⁴ Short of donations from private patrons or increased State funding, how to balance the value and cost of recovering stolen art and antiquities is a decision that must be made by the industry itself.²⁶⁵

257. *See id.*

258. For a discussion on why it is difficult to sell more valuable pieces, *see id.*

259. *See* BLAKE, *supra* note 20, at 30–31.

260. *See id.*

261. *See* First Protocol, *supra* note 27.

262. *See* Caesar, *supra* note 92.

263. *See, e.g.,* Vincent, *supra* note 220.

264. *See* CHECHI, *supra* note 35, at 139–42.

265. *See id.*

VI. CONCLUSION

Despite the tremendous strides that have been made to combat the loss of cultural heritage artifacts, the black market trade of art and antiquities remains a global problem.²⁶⁶ As long as there is demand on the market, the looting and sale of these items will continue to provide a lucrative trade.²⁶⁷ While current international and domestic conventions are working to combat this issue, they largely focus on on-going looting, imports, and exports, and are largely ineffective against collectors who are already in possession of stolen art and antiquities.²⁶⁸ Pierre Le Guennec is not the only one in possession of stolen art, but under the current regimes, there is nothing to encourage collectors to come forward with stolen artifacts.²⁶⁹ Common deterrence models only persuade these collectors to remain hidden.²⁷⁰ Despite the argument that it would exacerbate black market art trade, granting these collectors limited amnesty and economic incentive would encourage more lost art to be returned to the public stage.²⁷¹ Opening the black market to select reputable avenues of trade would draw these pieces out of hiding through legitimate sale.²⁷² Although this model presents a host of challenges, relying on existing regimes seems to only guarantee that these works will continue to be lost to the world forever.

266. See BLAKE, *supra* note 20, at 26.

267. See ULPH & SMITH, *supra* note 91, at 3.

268. See generally *Interview*, *supra* note 15.

269. See *id.*; see also Whitaker, *supra* note 1 (explaining that Le Guennec maintains that the artwork was not stolen, even though he was ultimately convicted of possessing stolen property).

270. See, e.g., Sainty, *supra* note 181.

271. See *supra* Part IV D.

272. See, e.g., Caesar, *supra* note 92.

